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CONCORD, N.H.

Mr. James A. Nelson
Deputy Bank Commissioner
State House
Concord, New Hampshire

Dear Mr. Nelson:

This is in reply to your letter of September 30, 1958, in which you advise that the Nashua Co-operative Bank wishes to sell a 50% share of certain mortgages held by it to the Manchester Federal Savings and Loan Association. You state that Harrison Smith, Esq., attorney for the Nashua Co-operative Bank, has pointed out that it is permissible for co-operative banks and building and loan associations to sell mortgages under RSA 393:23. You inquire whether or not in our opinion it would be legal for the Nashua Co-operative Bank to participate in a mortgage with another institution.

With your letter of September 30, you submitted a photostatic copy of a form of Participation Agreement together with attached Exhibits "A", "B" and "C" styled: "Seller's Offer", "Buyer's Commitment", and "Participation Certificate", respectively. Presumably, instruments of similar tenor would be used in connection with the proposed participation between the Nashua Co-operative Bank and the Manchester Savings and Loan Association.

At the outset we wish to emphasize that this office has no legal authority or jurisdiction to render an official ruling in this matter which would be binding upon either of the above-named institutions. Pursuant to your request we are, however, happy to express our views for whatever value they may have in assisting you in the performance of your duties as a State official.

The statutory provisions with respect to the organization and regulation of co-operative banks and building and loan associations appear in RSA 393 and section 23 thereof, referred to by Attorney Smith, provides in part that such institutions "may sell,

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transfer, assign, purchase, and repurchase real estate mortgages, notes or other securities . . . provided that such loans, notes and other securities are of such a type and within such limits as are prescribed for direct investment by building and loan associations under this chapter." We believe the terms "sell", "transfer", and "assign", as used in this section, contemplate a change in ownership of an entire chose in action such as a promissory note and, if the note is secured by a mortgage, a change in ownership of the entire mortgage. Had the legislature intended this section to authorize participating loans through a partial transfer or assignment of notes, mortgages, or other securities, it would have been a simple matter for it to have inserted appropriate words to clearly indicate such intent. For instance, insertion of the words "in whole or in part" after the words, "sell, transfer, assign, purchase, and repurchase", would have been sufficient. We deem the absence of any such language an indication that this section was not designed or intended to authorize participation loans by building and loan associations or co-operative banks.

Although we have carefully scrutinized the other provisions of 393 we find nothing therein which in our opinion either expressly or impliedly authorizes participation loans by such institutions.

On the other hand an examination of RSA 337:1, XIII, XIV and XV, and RSA 387:17 (supp) reveals that the legislature has expressly recognized the legality of participation loans by other types of lending institutions and subject to certain conditions declared them to be legal investments for savings banks and savings departments of banking and trust companies.

RSA 387:1, XIII, XIV and XV defines the terms "Originating Lender", "Participating Lender", and "Participating Loan", respectively. It is significant that each definition includes savings banks, banking and trust companies, national banks, insurance companies and fraternal benefit societies, but excludes co-operative banks and building and loan associations.

RSA 337:17 (supp) spells out in considerable detail the minimum requirements for participating loans. Paragraph I relates to participating loans secured by real estate or chattel mortgages while paragraph II deals with collateral and unsecured loans. In passing we note that the photostatic form of Participation Agreements submitted with your letter does not meet all the requirements of RSA 337:17 (b) (supp). For instance we find nowhere any provision that if legal right to foreclose exists the originating lender, within sixty days of written notice of desire to withdraw by any participating lender shall institute foreclosure proceedings or pay to such participating lender the amount then currently due such lender."

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In summary we find no express or implied authority in RSA 393 for participation loans by co-operative banks or building and loan associations. While on the other hand we find in RSA 387 that the legislature has expressly recognized and given detailed attention to participation loans by numerous other lending institutions. Accordingly we are of the opinion that participation loans by such institutions are not authorized under existing statutes.

It may well be that participation loans by such institutions are in the public interest and in this vein we would point out that if enabling legislation is desired it should be drafted soon for presentment to the 1959 Session of the General Court which convenes less than two months hence.

Very truly yours,

George T. Ray, Jr.
Assistant Attorney General

GER, Jr/lt